TABLE OF CONTENTS

	Page
No Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes	3
Amendments to U.S. Constitution	4
Statement of Case	4
Reasons for Granting the Writ	6
Conclusion	13
Appendix A—Judgment of Court of Appeals	A1
Appendix B—Extract of Petitioner's Brief to the Circuit Court	A3

Cases Cited

Hoyer v. United States, 223 F.2d 134 (8th Cir. 1955) 9

United States v. Bass, 404 U.S. 336 (1971) 7

United States v. Byrd, 352 F.2d 570 (2d Cir. 1965) 8

United States v. DeCicco, 435 F.2d 478 (2d Cir. 1970) 7

United States v. Ross, 321 F.2d 67 (2d. Cir. 1963) 11

United States v. Smith, 283 F.2d 760 (2d Cir. 1960) 10

Statutes Cited

18 U.S.C. 2314 3

18 U.S.C. 371 3

18 U.S.C. 2 4

Constitutional Amendments

Fifth 4
Sixth 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

JOHN P. RUBEO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on the 4th day of May 1972, which affirmed a judgment of conviction of the Southern District Court of New York (Cannella, J.) based upon a finding of guilt by a jury of two (2) counts of violating Title 18, United States Code, Sections 2314 and 371. Specifically, the petitioner was convicted of one (1) count of interstate transportation of stolen money and stolen winning race track tickets, and of one (1) count of conspiring to do so.

Petitioner was sentenced to concurrent three and one-half (3½) year terms of imprisonment.

BLURRED COPY

NO OPINION BELOW

The judgment of conviction of the District Court was affirmed without opinion of the Circuit Court.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on the 15th day of October 1972 (Appendix "A", *infra*, p. *id.*). No petition for rehearing has been made to the Circuit Court of Appeals for the Second Circuit. An extension of time has been granted within which to file this petition until December 12, 1972. Jurisdiction of this Court is invoked under Title 28, Section 1254(1) United States Code and Rule 22(2).

QUESTIONS PRESENTED

1. Whether the judgment of conviction should be reversed and the indictment dismissed because the District Judge erroneously permitted the introduction of prejudicial, incompetent, irrelevant and immaterial evidence of a similar act, not amounting to nor constituting a federal crime? (The prior robbery of the same victim was not an interstate act.)

2. Whether the judgment of conviction should be reversed and the indictment dismissed because the District Judge erroneously permitted evidence of another crime (not federal) to be admitted, even though intent was not in issue? (The petitioner did not testify.)

3. Whether the judgment of conviction should be reversed and the indictment dismissed because the District Judge erroneously preempted the function of the jurors as the triers of

the facts and in effect, directed the jury to disbelieve the defense and to render a verdict of guilty? (The inapposite analogy to the Louis vs. Schmeling prize-fight.)

4. Whether the petitioner's constitutional rights under the Fifth and Sixth Amendments were violated by the erroneous act of the District Judge in preempting the function of the jurors as the impartial judges of the facts.

5. Whether the judgment of conviction should be reversed and the indictment dismissed, because the District Judge erroneously permitted improper identification of the co-defendant, Accurso by the victim, which was prejudicial to the petitioner, who was not identified by the victim, but who was charged as a co-conspirator of Accurso?

STATUTES

18 U.S.C. 2314

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

18 U.S.C. 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any

BLURRED COPY

offense against the United States, ***, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, ***

18 U.S.C. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

CONSTITUTIONAL AMENDMENTS

(In pertinent part)

Fifth: "No person shall...be deprived of life, liberty or property, without due process of law...."

Sixth: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."

STATEMENT OF THE CASE

The testimony indicated that one Lapidus was robbed of cash and winning race track tickets on the evening of March 14, 1971 while in his automobile in Darien, Connecticut, having driven there from Roosevelt Raceway, Long Island, New York.

The District Judge permitted the victim Lapidus to testify that he had been the victim of a similar robbery by presumably

the petitioner or co-defendants in Westchester County, New York, two (2) weeks prior thereto. This prior robbery was not the subject of any federal charges against the petitioner or co-defendants having been committed solely within the State of New York, but the government was permitted to prove such occurrence as a prior similar act.

The petitioner did not testify.

The victim was unable to identify the petitioner. However, improper identification procedures appear to have been used against the co-defendant, Accurso, with whom the petitioner is charged as a co-conspirator. Counsel assumes that this point will be developed by Accurso's attorney in his petition for a writ of certiorari and incorporates such argument herein by reference. If such point is not made by Accurso, then petitioner will rely upon the presentation thereof in the appellants' brief to the Court of Appeals for the Second Circuit.

The District Judge instructed the jury, in effect, that the defense was incredible and unbelievable. In referring to the boxing match in which Schmeling knocked out Louis, the Judge attempted to equate the jury with the spectator at the fight who did not see the knockout blow, but merely saw Louis, prone on the canvas ring. The following pertinent quote from the Court's Charge is set forth below:

> "He was only relying on circumstantial evidence. He didn't see it. It could be dreamed up that some fellow up in the upper tiers of Madison Square Garden, which I could even see now, way up, 200 yards maybe away, with a high-powered rifle, with a telescopic lens, could have killed Schmelling and killed him in that fashion and had him lying prone on the canvas. Somebody could have put

cyanide in his drink and killed him that way so that he was prone. There are many things that could have happened.

But do you think that an ordinary person asking that man what happened to Schmelling that night, that he couldn't say to them, based on what I know about this, the circumstantial evidence that I know, he was knocked out by Joe Louis. Yes, but he could have been shot by a guy up in the upper tiers. Well, he could have been, sure. But circumstantial evidence works that way and that's the way you use it every day of your life. You go down, you wait for the subway. You didn't see the train leave the Bronx to come down here or come up from Brooklyn. But you have done things over the course of years and certain things happened and if you know that if you do those things, other things will happen, and that is the way circumstantial evidence works and that's the way you should apply it to this case.

These tickets, for example, are only circumstantial evidence, and as far as the Rubeo part of it is concerned, the explanation of his that he gave them to his father and his father went and gave it to the brother-in-law or the son-in-law, as it be, and he went and tried to cash them, well, the *Government has taken one position on that; they say Joe Louis was knocked out. The defendants say, oh, wait a minute, it could have been a guy up in the audience with a telescope.* You make your own judgment on that. You come to your own conclusion" (14a-15a). (Emphasis supplied.)"

REASONS FOR GRANTING THE WRIT

1. The District Judge, over objection, erroneously permitted the victim Lapidus to testify that he had previously been held up and robbed about two (2) weeks prior to the indictment incident, and that supposedly the petitioner and/or

co-defendants were involved. Such prior robbery was strictly a State crime and there was no federal jurisdiction over it. Moreover, it was not the subject of any complaint or indictment. Such testimony was adduced as part of the government's main case.

In order to constitute a federal crime, federal jurisdiction must be predicated upon interstate commerce (See *United States v. Bass*, 404 U.S. 336(1971)).

Absent any interstate commerce, the prior factual situation does not constitute nor amount to any violation of the federal law; hence such prior act is not a federal crime, nor admissible as such.

2. Proof of similar acts will not be admitted where intent is not at issue.

The decision in *United States v. DeCicco*, 435 F.2d 478 (2d Cir. 1970) wherein the same factual situation existed, mandates reversal of the instant judgment of conviction. There, as here, the issue of intent or knowledge was not raised by the defendant. There, the Circuit Court reversed and held that the probative value of these prior acts was far outweighed by the prejudicial effect it would have on the jury.

Judge Waterman's language therein is especially significant:

> "The rule which, despite the general rule, authorizes the admission into evidence of prior crimes similar in nature to the crime sought to be proved at trial authorizes it in order to prove knowledge, intent, or design. Therefore the evidence is compensatingly probative if the element of intent, etc. is placed in issue in the case at trial, either by the nature of the facts sought to be proved by the

prosecution or the nature of the facts sought to be established by the defense. United States v. Smith, *supra.*"

Again, in *United States v. Byrd,* 352 F.2d 570 (2d Cir. 1965), the Court observed:

"It is generally recognized that there can be no complete assurance that the jury even under the best of instructions will strictly confine the use of this kind of evidence to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar criminal act, probably committed the one with which he is actually charged."

"For the present purpose of this discussion it is enough to point out that the scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of intent in the Government's main case. Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it, is slight, its admission at that stage may be held to be an abuse of discretion. Under such circumstances the better practice would be to sustain the objection to the offer on the Government's main case."

As Judge Lombard stated in *DeCicco (supra).*

"The rule regarding the admission of evidence of similar crimes can be simply stated. Such evidence, because of its highly prejudicial nature, is not admissible until the defendant has raised the issues of motive or intent. United States v. Smith."

Similar acts or other crimes are inadmissible to prove the commission of the crime charged. In *Hoyer v. United States of America*, 223 F.2d 134 (8th Cir. 1955), it was clearly held that "...proof of another similar crime is not admissible for the purpose of proving the particular crime charged..." This is exactly what the Government did in the instant case. The finding of guilt was bottomed upon and induced by the prior similar act.

Added to the probability of prejudice is the fact that the jury did not render its verdict in this case on the basis of "conspiring" or "interstate transportation of stolen property" but rather on the basis of being a member of a criminal gang dealing in such type of robberies.

The purported prior holdup of the same victim by the same persons tended to show by speculative innuendo that petitioner was a member of a ring or gang which specialized and was engaged in the business of holding up and robbing winning track bettors of their winnings.

As the Court stated in DeCicco (supra):

> "Such evidence tended to show that Russell DeCicco and Gregory Parness were in the business of stealing art treasures and thereafter dealing in them."
>
> •••
>
> "Therefore, whatever probative value the prior crimes of DeCicco and Gregory Parness added to the prosecution's case on the issue of defendants' intent to commit

the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants, at least defendants DeCicco and Gregory Parness, were a continuing band of art treasure thieves and "fencers."

•••

"In any event, we conclude that the prejudice engendered by the admission into evidence of the prior acts of misconduct, even against Russell DeCicco and Gregory Parness, the doers thereof, far outweighed its legitimate probative worth, and that therefore it was an abuse of discretion for the trial court to allow its admission though the admission of the testimony was accompanied by cautionary instructions to the jury."

In *United States v. Smith*, 283 F.2d 760 (2d Cir. 1960), the Court, in referring to proof of other crimes, observed:

"It is inadmissible, however, because it unduly confuses the decision of the issue on which the case must finally turn, and makes it likely that the jury may substitute the general moral obliquity of the accused."

In any event, evidence of the prior similar act was prematurely offered into and accepted as evidence as part of the Government's main case. The vice of such a procedure is glaringly illustrated in this case, where the petitioner rested without taking the stand.

The only justification for admitting such evidence was the fallacious assumption that the defense would be based in part upon lack of intent. However, intent was not placed in issue by

BLURRED

the petitioner. In a situation such as this, where the Government prematurely introduces evidence of similar acts predicated upon the presumptuous belief that intent would be placed in issue by the petitioner, the Government must assume the risk that there would be no such issue to be contested and hence, such evidence would be inadmissible.

In *United States v. Byrd (supra)*, the Court criticized and condemned such practice of anticipation at the expense of and prejudice to a defendant where intent is not put in issue by a defendant.

> "Another factor to be considered is whether the Government was faced with a real necessity which required it to offer the evidence in its main case. The defense had not, either in its claims or the statement of facts which it would seek to prove, 'sharpened' the issue of intent by asserting that the act charged was done innocently or by accident or mistake. McCormick, Evidence, § 157 at 331 (1954); Vol. 1 Wharton's Criminal Evidence, § 237 at 528 (12th ed. 1955). Nor did the Government suffer from a lack of evidence of intent. Kaufman's testimony relating to the first two counts furnished ample evidence of knowledge and intent, of the same kind and quality as that shown by his testimony concerning the Sandberg tax return. There was therefore no pressing necessity that evidence of that prior occasion be offered on the Government's main case. United States v. Ross, 321 F.2d 61, 67 (2d Cir. 1963)."

***

3. Historically, the determination of the facts is restricted solely to the jury. A trial judge is not permitted to preempt

RED COPY

such function, nor make such determination, either directly or indirectly, as was done in this case.

It is common knowledge that Schmeling won the fight with Louis. The District Judge erroneously equated the Government's case with the long-established outcome of the fight and practically directed the jury to convict because every fight fan knows that Schmeling won. On the other hand, the District Judge erroneously equated the defense with a far-fetched and unreal fantasy that Louis was not knocked out by Schmeling but shot by "a guy in the audience", or murdered by cyanide (12a-13a), which every fight fan knows to be untrue, thereby instructing the jury NOT to believe the defense, but to convict.

The weaving of such an improper and prejudicial narrative to the jury, deprived the petitioner of due process of law under the Fifth Amendment. By reason thereof, he was deprived of a fair trial. By reason thereof, he has been deprived of his liberty. By reason thereof, he was deprived of the jury trial by an impartial jury under the Sixth Amendment; to which he was entitled.

4. The improper identification of the co-defendant Accurso, by the victim LAPIDES, who did not identify the petitioner, was highly prejudicial to the petitioner, inasmuch as the petitioner was charged with conspiring to commit the crime of interstate transportation of stolen money and race tickets, with the co-defendant, Accurso. In this connection, the attention of this Court is respectfully invited to the petition for writ of certiorari being filed in behalf of the co-defendant, Accurso, or in lieu thereof, to Exhibit B, which contains the argument in support of such contention made to the Circuit Court, both of which are adopted by petitioner and made part hereof by reference.

BLURRE

CONCLUSION

The issues above discussed are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRWIN KLEIN, P.C.
Counsel for Petitioner.

(IRWIN KLEIN)
Of Counsel

RRED COPY

EXHIBIT A

JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of October one thousand nine hundred and seventy-two.

Present: HON. HENRY J. FRIENDLY,
Chief Judge

HON. HAROLD R. MEDINA,

HON. ROBERT P. ANDERSON,

Circuit Judges,

United States of America,
Plaintiff-Appellee,

William Accurso, John P. Rubeo and John Wieland,
Defendants,

William Accurso and John P. Rubeo,
Defendants-Appellants.

BLURRED

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

ED COPY

EXHIBIT B

EXTRACT OF PETITIONER'S BRIEF TO THE CIRCUIT COURT

ARGUMENT

POINT I

THE MAIN WITNESS FOR THE PROSECUTION WAS THE VICTIM, SAM LAPIDUS, WHO WAS A SELF-CONFESSED PROFESSIONAL GAMBLER. SINCE HIS IDENTIFICATION OF ACCURSO WAS CRUCIAL, IT WAS PREJUDICIAL ERROR TO PERMIT LAPIDUS TO TESTIFY THAT HE HAD IDENTIFIED A PHOTOGRAPH OF APPELLANT ACCURSO FROM A SERIES OF PHOTOGRAPHS SUPPLIED BY THE GOVERNMENT, IN VIEW OF THE FACT THAT ONLY THE PICTURE OF ACCURSO, AMONG THOSE SHOWN TO LAPIDUS, DISPLAYED A PERSON WEARING GLASSES.

During the trial the witness Lapidus was permitted to testify that he identified a photograph of Accurso, who requires corrective eyeglasses at all times, from a series of photographs wherein only his picture depicted a person wearing glasses. It was argued that this identification was so prejudicially suggestive that it should have been suppressed and that Lapidus should have been precluded from identifying Accurso at the trial based upon this recollection (T118-126).

At the trial the witness testified as follows:

"Q. But you thought he was wearing glasses? A. Yes. I told the FBI that I only saw him for a minute and I had the feeling he either was or should have been wearing

glasses. In other words, I had the feeling that his eyes had that look that he should be wearing glasses.

Q. But you definitely mentioned the word 'glasses,' though; no question about that? A. Yes.

Q. Now, I show you these exhibits – I guess that is 1-A through K. Of all the pictures here, other than the one you picked out, which is namely 1-H, are any of these people wearing glasses other than the defendant Accurso? A. No, they are not.

Q. May I ask you this: You knew at the time that these were rogues' gallery type of pictures, didn't you? A. I would assume that, yes. I didn't know it, but I would assume that they were" (T121).

A motion to suppress was made and denied and, as a matter of fact, even at the time of sentence, the motion was again renewed, but to no avail (T364-365).

At the trial itself, the Court's attention was called to the fact that in a recent case, *United States v. Fred Fernandez*, 2 Cir. 1972, Docket No. 71-2129, decided February 24, 1972, where this Court itself had condemned suggestive identification (see Slip Opinion in *United States v. Fernandez, supra*, pages 1822-1825).

(See also, *United States v. Wade*, 388 U.S. 218, 228, 229.)

It must be borne in mind that the opportunity for identification by the witness Lapidus was poor at best. He had a rather vague recollection that one of the defendants wore glasses. Based upon this fact it was certainly highly prejudicial for the Government to create a suggestive "line-up" situation by producing for Lapidus' perusal a series of photographs wherein

only one of the individuals (Accurso) wore glasses. The photographs, moreover, were of a rogue's gallery type, indicating a probable prior history of criminality. It is, therefore, not surprising that Lapidus selected the only photograph of a person wearing glasses.

In *United States v. Wade, supra,* the Supreme Court aptly noted (id. at 228):

> "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent – not due to the brutalities of ancient criminal procedure.' The case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor – perhaps it is responsible for more such errors than all other factors combined.' Wall. Eye-Witness Identification in Criminal Cases 26. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.
>
> Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so

that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.' "

This Court itself noted that suggestive identifications were impermissible *(United States v. Fernandez, supra.)*

It should be noted that the error here was exacerbated by the Trial Court since timely objection was made and the *Fernandez* case was called specifically to its attention.

Lapidus was not able to identify Rubeo at all so there can be no doubt that the improper identification procedures used against Accurso, who was charged as a *co-conspirator* with Rubeo, prejudiced both.

We are not unmindful of the fact that John Wieland testified against his co-defendants but, since he was an accomplice as a matter of law, we must assume that the jury very likely placed much more credence on the testimony of the victim Lapidus.

BLURRED COPY

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-751

JOHN P. RUBEO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioner and co-defendant Accurso were convicted of transporting stolen money and racetrack tickets in interstate commerce knowing the property to be stolen (18 U.S.C. 2314) and of conspiring to commit the offense (18 U.S.C. 371). Petitioner was sentenced to concurrent terms of three and one-half years' imprisonment.

The evidence at trial showed that in March 1971 petitioner, Accurso, and a third co-defendant, Wie-

492-812—73—1

land,[1] agreed to rob Samuel Lapides. They followed him in petitioner's car from a New York racetrack to a highway service area in Darien, Connecticut, where they robbed him of $3,700 in cash and $5,400 worth of winning racetrack tickets. Accurso and Wieland then forced Lapides to drive with them in Lapides' car to Yonkers, New York, while petitioner followed in his car. The three left Lapides in Yonkers and went to a restaurant where they divided the money (Tr. 31–36, 138–140, 196, 201–203).

1. Petitioner contends (Pet. 6–11) that the district court erred in admitting testimony relating to another robbery of Lapides about two weeks earlier by the same three men. This earlier robbery, which netted $5,100 in cash, followed several earlier unsuccessful efforts by the men to follow Lapides home from a New York racetrack (Tr. 18–28, 40–43, 86–88, 135–137).

It has long been settled that evidence of other crimes, though inadmissible to show the accused's character or criminal disposition, is properly received when offered to show an element of the crime charged or to corroborate other direct evidence, and when its probative value outweighs its prejudicial effect. See *Jones* v. *United States*, 258 U.S. 40, 48; *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *Spencer* v. *Texas*, 385 U.S. 554, 560–561. See, also, Rules 403 and 404(b)

[1] Wieland pleaded guilty to the transportation of stolen money and racetrack tickets and testified on behalf of the government.

of the new Federal Rules of Evidence.[2] The evidence here was properly admitted to show a continuing plan to victimize Lapides, to corroborate the existence of the conspiracy, to show the defendants' opportunity to commit the crime charged (*i.e.*, their knowledge of Lapides' habits and whereabouts), and to show the basis of Lapides' identification of Accurso as one of the robbers.[3]

2. Petitioner next contends (Pet. 11–12) that the district court's instructions (Tr. 329–331) on circumstantial evidence amounted to an improper comment on the evidence.[4] The judge explained that a friend of his had gone to the second Joe Louis-Max Schmel-

---

[2] Rule 404(b) provides:

> *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subdivision does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 403 states the general rule for the exclusion of prejudicial evidence:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[3] The fact that the first robbery involved no interstate transportation and therefore was not a federal offense does not affect the admissibility of evidence concerning it in a federal court. See, *e.g.*, *United States* v. *Feinberg*, 383 F. 2d 60, 71 (C.A. 2), certiorari denied, 389 U.S. 1044.

[4] We have set forth in an Appendix hereto the entire instruction about which petitioner complains.

ing prize fight, and had been turning around to take his seat when the knockout occurred. Although he had not seen the punch, he could rely on the circumstantial evidence of the crowd's reaction and the fighters' demeanor in concluding that Louis had knocked out Schmeling and in discounting other possible theories for Schmeling's prone position in the ring, such as that he had been shot by a man in the balcony.

The judge then stated that petitioner's possession of the stolen racetrack tickets was circumstantial evidence. The government's position, he said, was that the fighter had been knocked out; the defendant's position was that the fighter may have been shot by someone in the balcony.[5]

The trial judge's right to comment on the evidence is limited by his duty to instruct the jury that they are the sole judges of the facts and are free to reach their own conclusions. See *United States* v. *Lee*, 422 F. 2d 1049, 1052 (C.A. 5). See, also, Rule 105 of the new Federal Rules of Evidence.[6] Here, the court in-

[5] During cross-examination of Lapides, defense counsel questioned him concerning the possibility that he had lost the tickets prior to the robbery (Tr. 189–190). Petitioner's counsel suggested in summation that Lapides had in fact lost the tickets (Tr. 281).

[6] The rule provides:

> After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

structed the jury at the outset that they, not the attorneys or the court, were the sole judges of the facts and of the credibility of witnesses (Tr. 321). The court repeated that instruction immediately after the remarks of which petitioner complains (Tr. 331). Thus, even if the court's remarks are considered a comment on the evidence indicating disbelief in the defense theory as to how petitioner had come into possession of the racetrack tickets, the comment was properly made in the context of clear instructions as to the jury's province. The remarks did not constitute a direction to the jury to find petitioner guilty. Compare *Quercia* v. *United States,* 289 U.S. 466.

3. Petitioner argues (Pet. 12, A3–A6) that a pretrial photographic identification procedure was impermissibly suggestive and tainted Lapides' in-court identification of co-defendant Accurso.[7] Lapides testified out of the jury's presence that eight days after the second robbery he was shown ten photographs of "possible suspects" and that he pointed to Accurso as a person involved in both robberies (Tr. 117–120). Although Lapides had told investigators that the robber wore eyeglasses, only Accurso's photograph showed a person wearing eyeglasses. Lapides stated, however, that this factor did not influence his selection of Accurso's photograph (Tr. 121–123).

[7] Petitioner contends also that Lapides was erroneously permitted to testify concerning the photographic identification (Pet. A3). In fact, however, the only testimony concerning the photographs was during a hearing out of the presence of the jury (Tr. 117–138).

Moreover, Lapides testified that his in-court identification of Accurso, made a year after the photographic identification, was based on his recollection of the robber and not of the photographs (Tr. 131). Lapides had an ample opportunity to view Accurso on the occasion of each robbery (Tr. 137–138, 155–156, 187). He was positive in his in-court identification of Accurso as one of the robbers. Apart from the question whether petitioner has standing to object to the identification of Accurso, the identification here was not so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. *Simmons* v. *United States,* 390 U.S. 377, 384.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

APPENDIX

The instructions of the district court provided in pertinent part:

> But let me explain to you, for example, how circumstantial evidence works, with an incident:
>
> At one time I played football with the New York Giants, and we were given tickets to go and see a fight between Schmeling and Louis. Mr. Schmeling had beaten Joe Louis the first time around. He felt terrible about it. The rematch came along.
>
> Now, this fellow that I knew had bought one of these tickets for $100, quite an amount of money in those days, back about thirty years. And so he started off with this fight, the second Joe Louis-Schmeling fight, and went up to the Garden, a tremendous crowd, blocks around. He got there just about the time that the main fight was starting, and as he went along to get his seat, which was a good seat, three or four rows back from ringside, the fighters had been introduced in the ring and the referee was in the ring. He started to go into the seats behind the people in front of him. And all of a sudden everybody jumped up. The fight had started, the gong had clanged, and lo and behold, before he could even turn around or even look up or see anything, the fight was over. Joe Louis had beaten this fellow in thirteen seconds, I think it was.
>
> Could that fellow tell you that Schmeling was knocked out by Joe Louis? He didn't see it. People in the seats in front jumped up. He saw nothing. But then when he did get up he

saw Schmeling prone on the ring, he saw Joe Louis with a great grin on his face and his hands drawn up in the traditional position of a winner by the referee. Do you think if you asked him that night did he know whether Joe Louis beat Schmeling that he could tell you?

He was only relying on circumstantial evidence. He didn't see it. It could be dreamed up that some fellow up in the upper tiers of Madison Square Garden, which I could even see now, way up, 200 yards maybe away, with a high-powered rifle, with a telescopic lens, could have killed Schmeling and killed him in that fashion and had him lying prone on the canvas. Somebody could have put cyanide in his drink and killed him that way so that he was prone. There are many things that could have happened.

But do you think that an ordinary person asking that man what happened to Schmeling that night, that he couldn't say to them, based on what I know about this, the circumstantial evidence that I know, he was knocked out by Joe Louis. Yes, but he could have been shot by a guy up in the upper tiers. Well, he could have been, sure. But circumstantial evidence works that way and that's the way you use it

every day of your life. You go down, you wait for the subway. You didn't see the train leave the Bronx to come down here or come up from Brooklyn. But you have done things over the course of years and certain things happened and if you know that if you do those things, other things will happen, and that is the way circumstantial evidence works and that's the way you should apply it to this case.

These tickets, for example, are only circumstantial evidence, and as far as the Rubeo part of it is concerned, the explanation of his that he gave them to his father and his father went and gave it to the brother-in-law or the son-in-law, as it be, and he went and tried to cash them, well, the Government has taken one position on that; they say Joe Louis was knocked out. The defendants say, oh, wait a minute, it could have been a guy up in the audience with a telescope. You make your own judgment on that. You come to your own conclusion.

U.S. GOVERNMENT PRINTING OFFICE: 1975